

00719

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case Number 00-_____

IN RE THE MARRIAGE OF

LINDA K HARKIN, Petitioner,

v.

JOHN E HARKIN, Respondent.

FILED

OCT 11 2000

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

PETITION FOR WRIT OF SUPERVISORY CONTROL

STATE OF MONTANA, ex rel.
JOHN E. HARKIN,

RELATOR

v.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY,
THE HONORABLE KATHERINE R. CURTIS, PRESIDING,

RESPONDENT

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1		Case Register Report, <i>In re Marriage of Harkin, Cause No. DR-96-257 (B)</i>
2	September 02, 1998	<i>findings of fact, conclusions of law and decree of dissolution</i>
3	September 02, 1998	<i>order adopting parenting plan</i>
4	September 23, 1998	<i>order (adopting stipulation to place funds with A.G. Edwards)</i>
5	April. 1, 1999	<i>Jack's motion and brief for modification of child support</i>
6	April 27, 1999	<i>Linda's response to motion to modify child support and motion for modification of parenting plan</i>
7	May 12, 1999	<i>Jack's reply to petitioner's response to motion to modify child support</i>
8	May 17, 1999	<i>Jack's response to petitioner's motion to modify parenting plan</i>
9	May 17, 1999	<i>Jack's motion for reduction of child support</i>
10	August 18, 1999	<i>report to court from Family Court Services re parenting recommendations</i>
11	September 9, 1999	<i>notice of hearing regarding motions to modify child support and parenting plan</i>
12	October 1, 1999	<i>transcript of proceedings, hearing regarding motions to modify child support and parenting plan</i>
13	October 15, 1999	<i>Jack's modified child support calculations</i>
14	October 15, 1999	<i>Jack's proposed findings of facts, conclusions of law and order</i>
15	October 15, 1999	<i>Jack's memorandum of law regarding jurisdictional issues</i>
16	October 15, 1999	<i>Linda's proposed findings of facts, conclusions of law and order</i>
17	October 15, 1999	<i>Linda's memorandum re: district court jurisdiction pending appeal</i>
18	January 6, 2000	<i>Jack's motion and brief for priority hearing and for modification of parenting plan and to terminate his child support obligation</i>
19	January 14, 2000	<i>Jack's notice of issue and request for ruling</i>
20	January 27, 2000	<i>Linda's motion regarding parenting plan</i>
21	April 27, 2000	<i>opinion, In re Marriage of Harkin, 2000 MT 105 (April 27, 2000)</i>
22	May 26, 2000	<i>remittitur from Supreme Court to District Court</i>
23	May 27, 2000	<i>account statement, A.G. Edwards & Sons, Inc.</i>
24	June 5, 2000	<i>writ of execution, authorizing seizure of A.G. Edwards funds</i>
25	June 12, 2000	<i>notice of seizure of A.G. Edwards & Sons funds</i>
26	June 21, 2000	<i>Jack's notice of objection to writ of execution of judgment and seizure of property, and request for hearing</i>
27	June 27, 2000	<i>Jack's request for parenting plan hearing</i>
28	June 26, 2000	<i>Jack's motion and brief to terminate maintenance obligation</i>
29	June 27, 2000	<i>Jack's verified motion and brief for injunction to stay execution of judgment and request for order to show cause, and verified ex parte motion and brief for emergency temporary restraining order</i>
30	June 27, 2000	<i>transcript of proceedings before Judge Stadler, Marriage of Harkin</i>
31	June 28, 2000	<i>order regarding restraining order and injunctive relief</i>

32	July 12, 2000	Linda's <i>motion for scheduling order and hearing</i>
33	July 20, 2000	Jack's <i>creditor's claim against estate, In re Estate of Linda K. Harkin, deceased, Cause No. DP-00-079(A), Mont. Eleventh Jud. Dist., Flathead County</i>
34	July 21, 2000	Jack's <i>motion and brief for corrected order regarding temporary restraining order and injunctive relief</i>
35	July 21, 2000	Jack's <i>renewed ex parte motion and brief for emergency temporary restraining order and injunctive relief, and request for hearing</i>
36	July 21, 2000	<i>affidavit of P. Mars Scott (in support of renewed ex parte motion)</i>
37	July 21, 2000	Linda's <i>response to [renewed] motion for injunction</i>
38	July 26, 2000	Jack's <i>withdrawal of renewed ex parte motion for emergency temporary restraining order and injunctive relief</i>
39	July 26, 2000	Linda's <i>response to motion to terminate maintenance obligation</i>
40	August 1, 2000	Jack's <i>motion and brief to enforce decree of dissolution regarding division of marital personal property</i>
41	August 11, 2000	Linda's <i>response to motion and brief to enforce decree regarding personal property</i>
42	August 22, 2000	<i>notice of disallowance of creditor's claim, (In re Estate of Harkin, DP-00-079)</i>
43	August 24, 2000	Linda's <i>notice of issue and request for hearing</i>
44	August 27, 2000	<i>notice of surety bond filing/affidavit, (In re Estate of Harkin, DP-00-079)</i>
45	August 28, 2000	<i>order and rationale on motion to terminate maintenance and setting hearing</i>
46	August 31, 2000	<i>order and rationale on motion to enforce decree</i>
47	September 7, 2000	Jack's <i>notice of exception to order and rationale on motion to terminate maintenance</i>
48	September 7, 2000	Jack's <i>notice of exception to order and rationale on motion to enforce decree</i>
49	September 7, 2000	Jack's <i>notice of appeal of order and rationale on motion to terminate maintenance</i>
50	September 7, 2000	Jack's <i>notice of appeal of order and rationale on motion to enforce decree</i>
51		Jack's <i>motion for substitution of parties</i>

SUMMARY

COMES NOW John E. Harkin ("Jack"), through counsel, and pursuant to Rule 17, M.R.App.P., hereby requests this Court to exercise supervisory control over the district court in the matter of *In Re the Marriage of Harkin, Cause No. DR-96-257(B), Montana Eleventh Judicial District Court, Flathead County (Judge Katherine R. Curtis, presiding)*, and to (1) declare whether the district court presiding over the dissolution case or the district court presiding over the estate case has jurisdiction over the remaining dissolution issues pending in the dissolution court; (2) compel the district court to rule on Jack's pending motions which were submitted to the district court over a year ago; and (3) compel the return of certain marital estate funds to a neutral account until all rights of the parties have been determined in both the dissolution and estate cases.

The Petitioner, Linda K. Harkin, died on June 17, 2000, a separate probate case is now pending regarding her estate in district court, before a different district judge (*In re the Estate of Linda K. Harkin, deceased, Cause No. DP-00-079A, Eleventh Judicial District Court, Flathead County, Honorable Ted O. Lympus, presiding (filed June 26, 2000)*). Jack moves this court to provide guidance as to which district court has jurisdiction to decide the continuing issues stemming from the dissolution proceedings. Linda's

counsel in the dissolution case is now also the attorney representing the personal representative of Linda's estate, and he argues that the remaining dissolution matters should be decided in the estate court. *See Exhibit 37 (response to motion for injunction, Marriage of Harkin, July 20, 2000, at p. 2; Exhibit 39 (response to motion to terminate maintenance, Marriage of Harkin, July 25, 2000); Exhibit 41 (response to motion to enforce decree of dissolution regarding personal property, Marriage of Harkin, August 11, 2000, at pp.2-3).* Jack filed notices of creditor's claims in the probate court, notifying the probate court of Jack's pending claims in the dissolution court regarding child support, maintenance, and property division. *See Exhibit 33 (creditor's claim against estate, In re Estate of Harkin, July 20, 2000).* The personal representative of Linda's estate denied those claims in spite of the fact that the dissolution court has not ruled on Jack's child support motions and that Jack's motions regarding maintenance and child support have been appealed to this Court. *See Exhibit 42 (notice of disallowance of creditor's claim, Estate of Harkin, August 22, 2000).*

In the interest of judicial economy, to avoid needless or duplicative litigation and to avoid further appeals to this Court, Jack therefore requests this Court to declare which district court should appropriately determine which pending issues. As briefed in detail below, good practice dictates that

that all of his claims regarding the dissolution case should be resolved in the dissolution court before the estate court can proceed. The final judgment from the dissolution court should then be presented to the estate court as a creditor's claim.

After this Court has made its declaration regarding the jurisdiction of the dissolution court and the estate court, this Court should consequently order the dissolution court to issue rulings on Jack's motions for modification of child support that have been pending before the district court since April, 1999. This Court should then direct the estate court to order that the estate case be held in abeyance until final resolution of the parties' rights.

Finally, Jack moves this Court for an order that certain marital cash funds formerly held in a neutral account with A.G. Edwards & Sons investment firm be returned to a neutral account pending the final resolution of both the dissolution and estate cases and to vacate an order prepared by attorney David Astle that contravenes the order issued by Judge Stewart Stadler in open court.

LEGAL AUTHORITY FOR SUPERVISORY CONTROL

The exercise of supervisory control by this Court is authorized by Article VII, Section 2(2) of the Montana Constitution, and by Rule 17(a), M.R.App.P. This Court has further held that supervisory

control is appropriate where the district court is proceeding under a mistake of law, and so doing is causing a gross injustice. *State ex rel. Keyes v. 13th Jud. Dist. Ct.* (1998), 288 Mont. 27, 955 P.2d 639, 640.

One of the functions of supervisory control is "to enable this Court to control the course of litigation in the inferior courts where those courts are proceeding within their jurisdiction, but by a mistake of law, or willful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate." *Id.* (internal citations omitted). The determination of whether supervisory control is appropriate is a case-by-case decision, based on the presence of extraordinary circumstances and a particular need to prevent an injustice from occurring. *Park v. 6th Jud. Dist. Ct.* (1998), 289 Mont. 367, 961 P.2d 1267, 1270.

STATEMENT OF FACTS **WARRANTING SUPERVISORY CONTROL**

This application for writ of supervisory control arises from the matter of *In re Marriage of Linda K. Harkin, Petitioner, and John E. Harkin, Respondent, Cause No. DR-96-257(B), Montana Eleventh Judicial District Court, Flathead County, the Honorable Katherine Curtis presiding, filed March 31, 1996*. The district court entered its *findings of fact, conclusions of law and decree of dissolution* on September 1, 1998. *See Exhibit 2.*

Jack timely filed a *notice of appeal* on November 19, 1998. The Montana Supreme Court issued its opinion in the appeal of this matter, *In re Marriage of Harkin* (2000), 2000 MT 105, 999 P.2d 969, 57 St. Rep. 422, on April 27, 2000. *See Exhibit 21*. This Court affirmed the district court in part, but reversed the award of attorney fees of \$20,000 to Linda and remanded the matter back to the district court to conduct a hearing on the issue.

Many significant changes in circumstances occurred in the case between the September 1, 1998 *decree* and the present, (including changes in the parties' incomes, a change of residence of one parent to Montana from Oregon, a child turning 18 and becoming emancipated, and Linda's death), which caused both parties to file a number of motions and requests in the district court regarding child support, parenting, maintenance, and property division, including the following:

- | | |
|--|---------------------------|
| 1) Jack's <i>motion for modification of child support</i> | April 1, 1999 (Ex. 5) |
| 2) Linda's <i>motion for modification of parenting plan</i> | April 27, 1999 (Ex. 6) |
| 3) Jack's <i>motion for reduction of child support</i> | May 17, 1999 (Ex. 9) |
| 4) Jack's <i>motion for modification of parenting plan and motion to terminate child support</i> | January 6, 2000 (Ex. 18) |
| 5) Jack's <i>notice of issue and request for ruling</i> | January 14, 2000 (Ex. 19) |
| 6) Linda's <i>motion regarding parenting plan</i> | January 27, 2000 (Ex. 27) |

The district court has never issued any rulings on any of the above listed motions.

The district court apparently refuses to issue any orders that may benefit Jack Harkin. Because of the district court's inaction, Jack overpaid approximately \$19,922 to Linda for child support payments to which she was not entitled. Jack has yet to be reimbursed this money.

In addition to Jack's motions listed above, Jack has significant additional claims for property that was awarded to him but not released to him by Linda before her death, and for over \$70,000 in unaccrued maintenance. *See Exhibit 28 (motion to terminate maintenance, June 26, 2000); see also Exhibit 40 (motion to enforce decree of dissolution regarding personal property, August 1, 2000).* The district court entered rulings denying these motions brought by Jack, and those denials are the subject of notices of appeals filed with the district court on September 7, 2000. *See, Exhibit 45 (order denying motion re maintenance, August 28, 2000); Exhibit 46 (order denying motion re personal property, August 31, 2000); Exhibit 49 (notice of appeal regarding maintenance, September 7, 2000); Exhibit 50 (notice of appeal regarding personal property, September 7, 2000).*

On June 5, 2000, the district court allowed David Astle, Linda's

attorney (and now her estate's attorney), to take control of over \$200,000 that had been held in a neutral, interest-bearing trust account with the A.G. Edwards investment firm pending the resolution of the case. If this money is dissipated, Jack may have no remedy even if he ultimately prevails on his motions, creditor's claims, and/or appeals.

**LEGAL AUTHORITY REGARDING THE
COMPETING JURISDICTION OF THE DISSOLUTION
COURT AND THE ESTATE COURT**

Jack asserts that this court should declare which court -- the dissolution court or the probate court -- has jurisdiction to resolve the outstanding issues regarding the dissolution of the parties' marriage. Jack believes that the dissolution court should first determine the rights of the parties, and that the probate court should then accept the dissolution court's final judgment to act as either the acceptance or denial of the claims against Linda's estate.

Montana's statutes governing dissolution of marriage, contained in Title 40, Chapter 4, M.C.A., contain several statutes providing for modification of provisions for maintenance, support, and parenting plans upon the death of a spouse^{*}. Those statutes contemplate that the surviving spouse must file motions in the dissolution court to terminate or modify

^{*} See §40-4-208(4)(*termination of maintenance upon death of spouse*); §40-4-208(5)(*modification of child*

provisions for maintenance, support, and parenting plans. Title 40 contains no provisions that any such matters must be brought against the estate of the deceased spouse in the probate court, rather than in the dissolution court.

Section 40-4-103, M.C.A., provides that "the Montana Rules of Civil Procedure apply to all proceedings under this chapter, except as otherwise provided in this chapter." Rule 25, M.R.Civ.P. (1999) states that an action does not abate upon a party's death and provides the procedure for substituting the personal representative of the decedent's estate for the decedent. Specifically, Rule 25 states:

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party ...

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. ***The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.***

(3) ***After a verdict is rendered or an order for judgment is made in any action, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives by law, and substitution of parties shall be allowed as in other cases.***

support upon death of a parent); §40-4-219(6)(amendment of parenting plan upon death of a parent).

Id. (omissions; emphasis added).

At the time of Linda's death, a number of post-judgment motions were pending before the district court regarding child support, maintenance, and marital property division. Clearly, Jack's claims contained in those motions were not extinguished upon Linda's death. Linda's personal representative and her estate's attorney have both voluntarily appeared in the dissolution court action, and Jack properly filed a motion for substitution of the personal representative for Linda pursuant to Rule 25(a)(1), M.R.Civ.P. *Exhibit 51 (motion for substitution of parties, Marriage of Harkin)*. Here, the dissolution action did not abate upon Linda's death, and Rule 25, M.R.Civ.P., indicates that the dissolution action should proceed in the dissolution court upon substitution of the proper parties.

As stated above, a separate probate case is proceeding regarding Linda's estate, and Linda's counsel in the dissolution case is also counsel for Linda's personal representative in the probate case. The laws governing the estates of deceased persons contained in Title 72, M.C.A., grant the estate court broad jurisdiction. Title 72, like the Title 40, provides that the Montana Rules of Civil Procedure govern formal proceedings under Title 72, "unless specifically provided to the contrary." § 72-1-207, M.C.A.

The jurisdiction of the district court in an estate case is provided in §

72-1-202, which states in relevant part:

72-1-202. Subject matter jurisdiction. (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to:

(a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

§ 72-1-202, M.C.A. (1999).

Title 72, Chapter 3, M.C.A., contains the statutes governing claims against a decedent. Section 72-3-104 provides as follows:

72-3-104. Claims against decedent -- necessity of administration. (1) A proceeding to enforce a claim against the estate of a decedent or the decedent's successors may not be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, *all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by Title 72, chapter 3, parts 1 through 10, and 72-3-1101 through 72-3-1103.* After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in 72-3-1012 or from a former personal representative individually liable as provided in 72-3-1014.

§ 72-3-104, M.C.A. (1999)(emphasis added).

The procedures for creditors' claims against a decedent's estate are contained in Title 72, Chapter 3, Part 8. §§ 72-3-801, et seq., M.C.A.

(1999). § 72-3-803(1) states:

All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following time limitations:

...
§ 72-3-803(1), M.C.A. (1999)(omissions; emphasis added).

Section 72-3-803(3) further states:

(3) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

...
§ 72-3-803(3)(a), M.C.A. (1999).

Section 72-3-804, M.C.A., which provides the required manner of presentation of creditors' claims against a decedent's estate, generally requires a creditor to present the claim in writing, by certified mail, to the personal representative. § 72-3-804(1), M.C.A. (1999). However, the general rule does not apply to any matters contained in a pending court proceeding:

No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

§ 72-3-804(2), M.C.A. (1999). This Court has held that this exception applies to post-decree matters in a dissolution case, where one of the parties died before the pending motions, brought before the decedent's death, were resolved in the dissolution court. *See Reese v. Reese (1981), 196 Mont. 101, 637 P.2d 1183*. In *Reese*, like the present case, a separate estate proceeding was filed in the same district court. Although in *Reese* the same judge presided over both matters, this Court ruled that the district court was acting as "separate courts" on the estate and dissolution actions. *Id.*

Section 72-3-805, M.C.A. contains the procedures creditors' claims against an estate. Upon notice from the personal representative of disallowance of a creditor's claim, a creditor must either "file a petition for allowance or ... commence a proceeding on the claim" in the district court in which the estate case is pending. § 72-3-805(1), M.C.A. (1999). However, the statute indicates that matters claimed in proceedings against the decedent in another court should continue and be resolved in the original court:

(4) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

§ 72-3-805(4), M.C.A. (1999).

The provisions of Titles 40 and 72, M.C.A. and Rule 25, M.R.Civ.P., appear to indicate that Jack's claims against Linda's estate arising from the

dissolution proceedings, and which were pending at the time of Linda's death, should properly be resolved in the dissolution court before the corresponding claims against Linda's estate can be accepted or denied by the estate court.

**THE DISTRICT COURT SHOULD BE ORDERED
TO ENTER RULINGS ON JACK'S PENDING MOTIONS
REGARDING CHILD SUPPORT**

As discussed below, each of the pending motions and requests to the district court listed above is a separate and distinct motion, each supported by its own set of facts and circumstances, and therefore each is subject to a separate analysis:

1) Jack's April 1, 1999 *motion for modification of child support obligation (Exhibit 5).*

Jack moved for a recalculation of child support for the parties' children, Erica and George, based on the fact that he had moved to Montana from Oregon after the entry of the *decree* to be near the children, and because of a significant change in the parties' incomes and expenses under the Montana Child Support Guidelines. Linda filed her *response to motion to modify child support* on April 27, 1999 (*Exhibit 6*), in which Linda admitted that there had been sufficient changes of circumstances to warrant a recalculation of child support but disagreed as to the figures used. Jack filed

a *reply to petitioner's response* on May 12, 1999 (*Exhibit 7*). In September 1999, after more than 90 days passed with no ruling from the district court, Jack filed a request for hearing on the motions, and the district court scheduled the matters for hearing . *Exhibit 11 (notice of hearing, September 9, 1999)*.

The district court conducted a hearing on the motion on October 1, 1999. *See Exhibit 12 (transcript of proceedings, October 1, 1999)*. Jack presented testimony of a child support expert who testified that Jack was entitled to a reduction in child support for both children as of the date of his first motion to modify, and that Jack was entitled to a second reduction in child support as of June, 1999, when Erica graduated from high school, for a total of approximately \$19,922.

After the hearing Judge Curtis advised the parties that she would issue rulings in the matter by the end of October 1999, provided that by October 15, 1999 the parties submitted their proposed findings, conclusions, calculations, and briefs regarding the district court's jurisdiction pending appeal. Both parties timely filed all of these documents (*see Exhibits 13 through 17*), but the district court did not issue a ruling in the matter and still has not. *See Exhibit 1, (case register report)*.

On January 14, 2000, Jack filed a *notice of issue and request for*

ruling regarding the motion. *Exhibit 19*. Linda filed no response or objection to the notice of issue. The district court did not issue a ruling. *See Exhibit 1 (case register report)*. The child support motion is still pending before the district court, and as a result Jack continued to overpay child support since April, 1999 to June, 2000, in an amount of approximately \$19,922.

2) Linda's April 27, 1999 motion for modification of parenting plan (*Exhibit 6*).

Linda filed her own motion for modification of the *parenting plan* on April 27, 1999. Jack filed his *response* on May 17, 1999. *Exhibit 8*. Jack admitted that a modification was warranted due to changed circumstances, but the parties did not agree on the terms of a new parenting plan. Linda's counsel did not file a reply. *See case register, Ex. 1*. On August 18, 2000, the district court's Family Court Services Director *report to the court* recommended a modified parenting plan to provide for equal parenting time. *Exhibit 10 (FCS report to the court)*.

However, the district court took no action on the motion until Jack filed his *request for hearing* on September 7, 1999. *See Exhibit 11*. The district court held a hearing on this motion and Jack's April 1, 1999 motion, on October 1, 1999. *See Exhibit 12 (transcript of proceedings, October 1,*

1999). As stated, Judge Curtis advised the parties at the conclusion of the hearing that she would issue rulings in the matter by the end of October 1999 provided that by October 15, 1999 the parties submitted their findings, conclusions, calculations, and brief. The district court has never issued a ruling on the motion.

Granted, a new present parenting plan is no longer needed, since Linda died on June 17, 2000. However, the district court still needs to determine the parenting schedule that was in effect since April, 1999, in order to properly determine and rule on the pending child support issues.

3) Jack's May 17, 1999 *motion for reduction of child support (Exhibit 9)*.

This motion requested an order terminating Jack's child support as of June 5, 1999 for the parties' daughter, Erica, pursuant to the September 1, 1998 *decree*, because Erica had turned 18 and was graduating from high school on June 5, 1999. The court did not issue a ruling or enter the proposed order submitted by Jack, even though the motion conformed to the *decree*. Moreover, Linda's counsel failed to file an Answer Brief as required by Rule 2, U.D.C.R., requiring the district court to deem Jack's June 26, 2000 *motion* as being well taken and grant the motion accordingly. Rule 2, U.D.C.R.*

* Rule 2, U.D.C.R. specifically provides:
(b) **Failure to File Briefs.** Failure to file briefs may subject the motion to

Since the district court never issued a ruling on this motion, Jack continued to pay child support for his adult daughter. The court knew that Jack was suffering this injustice and allowed it to continue with no apparent justification. Jack has overpaid approximately \$19,922 for Erica's support.

4) Jack's January 6, 2000 *motion for modification of parenting plan, motion to terminate child support obligation, and request for priority hearing (Exhibit 18).*

This was a new motion based on further changed circumstances after Linda became ill and could not take care of the parties' remaining minor child. Jack filed this motion after he learned that Linda had become seriously ill and that the parties' minor child was in the care of an unrelated third party. Linda's counsel again did not file a response brief as required under Rule 2, U.D.C.R., and even though Jack specifically requested a priority hearing under § 40-4-216, M.C.A. the district court neither issued a ruling or set a hearing. *See case register, Ex. 1.*

5) Jack's January 14, 2000 *notice of issue and request for ruling (Exhibit 19).*

summary ruling. Failure to file a Brief within five days by the moving party shall be deemed an admission that the motion is without merit. ***Failure to file an Answer Brief by the adverse party within ten days shall be deemed an admission that the motion is well taken.*** Reply Briefs by movant are optional and failure to file will not subject a motion to summary ruling. *(emphasis added).*

After 90 days had passed since the post-hearing pleadings and memoranda were filed with the district court, Jack requested that the district court enter rulings. Linda filed no objection or responsive pleading. The district court issued no rulings. *See case register, Ex. 1.*

6) Linda's January 27, 2000 motion regarding parenting plan (Exhibit 20).

Linda's counsel filed a motion and supporting affidavits in which Linda acknowledged she could not care for the children but moved for an order to place the parties' minor child with third parties, in contravention of Montana law. Jack timely filed a response brief, but the district court did not issue a ruling or set the matter for hearing. *See case register, Ex. 1.*

The Montana Supreme Court issued its opinion in the appeal on April 27, 2000 and the remittitur to the district court was filed on May 26, 2000. *See Exhibit 21.* The district court still did not issue any rulings or set any of the above matters for hearing, and June 17, 2000 Linda died of cancer. On June 27, 2000, Jack filed a *request for parenting plan hearing (Exhibit 27)* and again requested the hearing be given priority for scheduling pursuant to § 40-4-216, M.C.A. The district court did not set the matter for hearing.

THE ESTATE CASE SHOULD BE HELD IN ABEYANCE
AND THE FUNDS SHOULD BE
RETURNED TO A NEUTRAL ACCOUNT
UNTIL RESOLUTION OF ALL PENDING MATTERS

In addition to the district court's apparent refusal to rule on Jack's child support motions, the district court has established a pattern of acting arbitrarily in this matter, by mistake or even disregard of Montana law. Now, the district court has allowed David Astle, Linda's counsel, and acting as Linda's estate's counsel, to take possession of over \$200,000 from Jack's Delta Air Lines retirement funds, even though nearly all of those funds are in dispute based on Jack's pending child support motions as discussed herein and Jack's pending appeals regarding maintenance and personal property issues. If this Court declines to take immediate supervisory control of the district court, those funds could be distributed and disbursed by Linda's counsel on behalf of the personal representative of Linda's estate. Once those funds are gone, Jack will have no remedy regardless of the ultimate resolution of Jack's claims regarding child support, maintenance, and property division.

As mentioned above, many extraordinary circumstances arose in this matter after the district court entered the *decree of dissolution* on September 2, 1998. After Jack notified Linda of his intention to file an appeal of the *decree*, the parties agreed that Jack would place \$200,000 dollars from his Delta Airlines retirement fund in an interest-bearing trust account held by the A.G. Edwards & Sons Investment Company in lieu of a supersedeas

bond, to secure the approximate amount awarded to Linda in the *decree* that was disputed by Jack. *See Exhibit 4 (order adopting stipulation, September 23, 1998)*. It is important to note, however, that Linda was not deprived of her share of Jack's retirement fund pending the appeal*; the \$200,000 placed with A.G. Edwards came entirely from Jack's share of his Delta Air Lines retirement fund, and represented amounts awarded to Linda in the *decree* (but disputed in Jack's appeal) for future maintenance, attorney fees, and division of property. *See Exhibit 2 (decree of dissolution)*.

At the time this Court entered its opinion, a number of issues were unresolved as a result of the pending motions as discussed above. The issue of attorneys' fees was also unresolved. In addition, an issue had arisen regarding Jack's awarded personal property which Linda held pending the outcome of the appeal, in that Linda now denied possessing many of the items, which had been valued by the district court at approximately \$85,000. *See Exhibit 40 (motion to enforce decree regarding personal property)*. Nevertheless, on June 5, 2000 Linda's counsel obtained a *writ of execution* from the district court to seize the entire A.G. Edwards account, which had appreciated to over \$211,000. *See Exhibit 24 (writ of execution)*.

* Linda received over \$419,000 in a lump sum from Jack's retirement fund, plus monthly payments of \$2,790, pursuant to the district court's December 19, 1996 *qualified domestic relations order* which was incorporated in the *decree of dissolution*. In addition, Linda received \$1,523 per month in child support from an automatic deduction from Jack's monthly Delta Airlines Retirement income, and she also received excellent health and medical insurance provided by Jack, which fully covered Linda's subsequent illness.

As stated, Linda died on June 17, 2000. On June 21, Jack filed a *notice of objection to writ of execution and request for hearing (Exhibit 26)*, in which Jack moved the district court to vacate the *writ of execution* and restore the court's previous orders that the funds remain protected in the A.G. Edwards account until the court could conduct a hearing on all outstanding financial issues. Linda's counsel once again filed no objection within ten days, yet the district court issued no ruling. *Exhibit 1*.

On June 27, 2000 Jack filed a *motion to terminate maintenance obligation*, which sought an order terminating Jack's maintenance obligation as of the date of Linda's death, pursuant to the express terms of the district court's September 1, 1998 *findings of fact, conclusions of law and decree of dissolution* and pursuant to § 40-4-208(4), M.C.A. *See Exhibit 27*. Jack moved the district court to order that the unaccrued amounts of the maintenance order, \$74,503, be returned to Jack from the A.G. Edwards account. *Id.* Linda's counsel once again failed to file an objection or brief in opposition to this motion within ten days as required by Rule 2(b), and the district court issued no ruling. *See Exhibit 1*.

Because the district court had not issued a ruling on Jack's June 21, 2000 *notice of objection to writ of execution*, on June 27, 2000, Jack's counsel appeared before the district court and presented his consolidated *ex*

parte motion for emergency temporary restraining order and motion for injunction (Exhibit 29) to the district court. The consolidated motions contained the allegation that between \$189,047 and \$209,047 of the \$211,000 was still in dispute subject to the pending dissolution issues. Id., p. 6, l. 16-24. Linda's counsel was present in court at the time Jack's counsel presented the motions the district court, and Judge Stadler was presiding in the absence of Judge Curtis, who was out of town. Judge Stadler conducted a hearing on Jack's ex parte motion with no objection from either party. See Transcript of proceedings, June 27, 2000, Exhibit 30.

The June 27, 2000 hearing was explicitly and exclusively limited to Jack's *ex parte motion*. See *Exhibit 30, Transcript of proceedings, p.2, l. 7-8; p. 20, l.3 to p. 21, l.18*. Not only did Judge Stadler specifically state that the hearing was only on the *ex parte motion*, but he further stated that the district court would, at a later date, conduct a hearing regarding Jack's *objection to writ of execution and motion for injunction*. Judge Stadler denied from the bench the *ex parte motion*, after Linda's counsel stated to the court that all of the approximately \$211,000 would be placed in a different trust and "and [were] not going to be distributed in any way." *Transcript of proceedings, p. 18, l.14-15; see, p. 18, l.3 to p. 19, l.1.*

Linda's counsel yet again failed to file an answer briefs as required by

Rule 2, U.D.C.R., either to Jack's *objection to writ of execution* or Jack's *motion for injunction to stay execution of judgment*. See *Exhibit 1*.

However, Linda's counsel did prepare a proposed *order* for Judge Stadler regarding the June 27, 2000 hearing, which the judge signed on June 28, 2000. *Exhibit 31*. The *order* prepared by Linda's counsel blatantly misrepresented that the hearing was regarding both motions for injunctive relief and that both motions were denied:

This matter came on for hearing on Respondent's Verified Motion for Injunction to stay execution of judgment with accompanying Brief.

. . .

IT IS HEREBY ORDERED that Respondent's *request for injunctive relief and* emergency temporary restraining order are hereby denied ..."

Id. (emphasis added).

Based upon the district court's June 28, 2000 order denying Jack's motions for injunctive relief, the A.G. Edwards & Sons trust account was dissolved and the \$211,000 was released to Linda's attorney. Jack timely filed a creditor's claim against the estate in the amount of \$196,876, the amount representing the disputed amounts based on the pending issues regarding maintenance, attorney fees, child support, and personal property division (*Exhibit 33*), and Linda's attorney denied the claims, even though the dissolution court matters have not been resolved (*Exhibit 42*).

On July 18, 2000, the dissolution court held an informal telephone conference with Jack's counsel and Linda's counsel to discuss all outstanding issues and pending motions. No record was kept of this conference.

Counsel for both parties requested a hearing to resolve all outstanding issues in the case, and the court stated that such a hearing would be scheduled immediately. The court stated that Jack would need to file a separate motion regarding the unreturned personal property, and Jack filed his *motion and brief to enforce decree regarding division of marital personal property* on August 1, 2000. *See Exhibit 40.* Linda's counsel filed the *petitioner's response* to the motion on August 11, 2000. *See Exhibit 41.*

On August 22, 2000, Linda's counsel, acting as counsel for the Estate of Linda Harkin, denied Jack's creditor's claim against Linda's Estate for the amounts subject to the pending matters in the dissolution court regarding maintenance, attorney fees, child support and personal property division. *See Exhibit 42 (notice of disallowance of creditors' claim).*

On August 24, 2000, Linda's counsel filed a *notice of issue and request for hearing* on all matters before the district court, including child support, maintenance, personal property, and attorney fees. *See Exhibit 43.*

On August 28, 2000, without conducting a hearing and despite the fact that Linda's counsel did not timely file an answer brief opposing Jack's

June 26, 2000 *motion to terminate maintenance obligation*, the district court denied Jack's motion and issued its *order and rationale on motion to terminate maintenance*. See *Exhibit 45*. Jack therefore filed a *notice of exception (Exhibit 47)* and a *notice of appeal (Exhibit 49)* on September 7, 2000.

On August 31, 2000, without conducting a hearing regarding *any* of the issues, the district court denied Jack's motion regarding the personal property. See *Exhibit 46 (order and rationale on motion to enforce decree)*. Jack therefore filed a *notice of exception* to the court's order (*Exhibit 48*) and *notice of appeal (Exhibit 50)* on September 7, 2000.

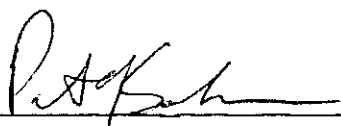
CONCLUSION

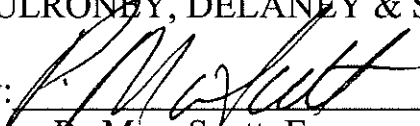
Based on the foregoing facts, supervisory control is necessary because the district court has apparently refused to issue any rulings on Jack's motions regarding child support, which have been pending since April, 1999. The court's inaction has unjustly forced Jack to pay approximately \$19,922 dollars which he did not owe under the Montana Child Support Guidelines.

The district court denied Jack's request that the A.G. Edwards trust account funds continue to be safely held in trust until all financial issues could be decided, and thereby allowed Linda's counsel to take personal

control of the entire \$211,000. The money is now being administered, distributed and spent. Once the money is gone, Jack will have no remedy, regardless of the district court's ruling on the pending motions and regardless of this Court's rulings on Jack's appeals regarding Jack's maintenance and personal property motions.

DATED this 11 day of October, 2000.

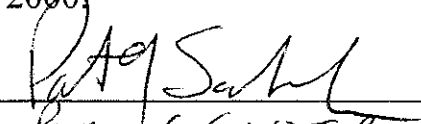
By: 
Patrick G. Sandefur, Esq.

MULRONEY, DELANEY & SCOTT
By: 
P. Mars Scott, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 17(b) and Rule 27(d) of the Montana Rules of Appellate Procedure, as amended by order of this Court effective August 1, 2000, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is less than 5,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and addenda containing quoted statutes, rules, regulations, or excerpts from the court record.

Dated this 11 day of October, 2000

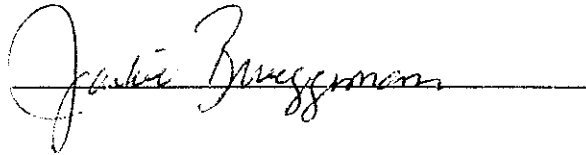

PATRICK G. SANDEFUR

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief was duly served by prepaid mail upon the following counsel of record this 11TH day of October, 2000.

Honorable Katherine R. Curtis
District Court Judge, Department 2
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A handwritten signature in cursive script, reading "Justin Bruggeman", is written over a horizontal line.